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BEFORE THE

UNITED STATES SENATE COMMITTEE ON INDIAN AFFAIRS

Hearing on Contemporary Tribal Governments: Challenges in Law Enforcement Related to the Rulings of the United States Supreme Court

July 11, 2002

Mr. Chairman, Mr. Vice-Chairman and members of the Committee, my name is Thomas B. Heffelfinger. I am the United States Attorney for the District of Minnesota. I am also the Chairman of the Attorney General Advisory Committee's Native American Issues Subcommittee. The membership of the Native American Issues Subcommittee consists of U.S. Attorneys from across the United States who have significant amounts of Indian country in their districts. The purpose of this body is to develop policies pertaining to the establishment and development of effective law enforcement in Indian country. In May of this year, the Native American Issues Subcommittee decided that its priorities in Indian country law enforcement would include addressing such issues as: terrorism (including border issues and the protection of critical infrastructure), violent crime (including drug offenses, firearms offenses, domestic violence, child abuse, and sexual abuse), gaming, and white collar crime.

Since 1885, when Congress passed the Major Crimes Act[1], United States Attorneys have had primary responsibility for the prosecution of serious violent crime in Indian country. Native Americans

[1]Now codified at 18 USC 1153.

are victimized by violent crime at rate of about 2 ½ times the national average rate[2]; in some areas of Indian country that rate may be even higher. The Major Crimes Act gives the United States jurisdiction to prosecute offenses such as: murder, manslaughter, kidnapping, arson, burglary, robbery, and child sexual abuse. However, federal jurisdiction under this statute is limited to the prosecution of Indians only. The Indian Country Crimes Act[3], which is also known as the General Crimes Act, gives the United States jurisdiction to prosecute all federal offenses in Indian country except when the suspect and the victim are both Indian, where the suspect has already been convicted in tribal court, or in the case of offenses where exclusive jurisdiction over an offense has been retained by the tribe by way of treaty.

The United States Supreme Court has held that where the suspect and the victim are both non-Indian, then the state court has exclusive criminal jurisdiction[4]. Under the Indian Civil Rights Act, tribal courts have criminal jurisdiction over non-member Indians[5]; however, tribal court sentences are limited to misdemeanor punishments[6]. In the 1978 decision of Oliphant v. Suquamish Tribe[7], the United States Supreme Court decided that tribal courts could not exercise criminal jurisdiction over non-Indians.

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[2]Bureau of Justice Statistics, US Department of Justice, American Indians and Crime (1999), at 2.

[3]18 USC 1152.

[4]Draper v. United States, 164 US 240 (1896); United States v. McBratney, 104 US 621 (1882).

[5]25 USC 1301(2) & (4).

[6]25 USC 1302(7).

[7]435 US 191 (1978).

Overlaying these legal principles is the question of whether or not the offense occurred in Indian country. Although "Indian country" is defined as land that is either: 1) within a reservation, 2) within a dependent Indian community, or 3) on an allotment[8], litigation over whether or not a particular crime scene is within Indian country can tie up litigation for years. For example, the Indian country status of certain lands within the Uintah and Ouray Ute Tribe's reservation in Utah was uncertain for approximately twenty years.[9] As a result, many violent crime convictions were thrown into doubt. These convictions were, however, eventually upheld.[10].

What all this means is that whenever a crime occurs in Indian country, in order to determine jurisdiction, prosecutors are forced to make a determination concerning who has jurisdiction by examining four factors: 1) whether the offense occurred within "Indian country", 2) whether the suspect is an Indian or a non-Indian, 3) whether the victim is an Indian or a non-Indian (or whether the crime is a "victimless" one), and 4) what the nature of the offense is. Depending on the answer to these questions, an offense may end up being prosecuted in tribal court, federal court, or state court.

There is much confusion concerning jurisdiction over crimes committed in Indian country. Unlike jurisdiction over most state and federal criminal offenses, in which jurisdiction and/or venue is determined by the geographical location of a crime scene, the current state of the law requires that determination of criminal jurisdiction in Indian country be accomplished through a complex analysis of

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[8]18 USC 1151.

[9]Ute Indian Tribe v. Utah, 114 F.3d 1513 (10th Cir. 1997), cert. denied, Duchesne County v. Ute Indian Tribe, 522 U.S. 1107 (1998), applying the decision of Hagen v. Utah, 510 U.S. 399, (1994), reh. denied, 511 U.S. 1047 (1994).

[10]US v. Cuch, 79 F.3d 987 (10th Cir. 1996).

sometimes amorphous factors. Police, prosecutors, defense attorneys, and judges must deal with this jurisdictional maze in cases ranging from littering to homicide[11]. This confusion has made the investigation and prosecution of criminal conduct in Indian country much more difficult. A clarification of this confusion is needed. The effort put into dealing with jurisdictional questions could be better expended on providing tangible public safety benefits.

Last year, federal courts handed down a number of decisions adverse to Indian country law enforcement. In Nevada v. Hicks, 533 US 353 (2001) the Court made statements in dicta that have now led many state law enforcement agencies to conclude that they no longer need to cooperate with tribal authorities when serving search warrants or arrest warrants in Indian country regarding crimes that took place off-reservation. After years of coalition building between state and tribal law enforcement agencies, this interpretation has now led to conflict between many state and tribal law enforcement agencies. Other problematic decisions in 2001 include: Cabazon Band v. Smith, 249 F.3d 1001 (9th Cir. 2001) (holding that county sheriff's officers may stop and charge tribal police officers for having emergency light bars on their police cars)[12], United States v. Follett, 269 F.3d 996 (9th Cir. 2001) (holding that despite mandatory restitution laws, a federal court cannot order a convicted sex offender to make restitution to a tribally run crisis center that provided care and counseling to the victim), and

[11]Recently the International Association of Chiefs of Police has called for law enforcement reform in Indian country, see, Improving Safety In Indian Country: Recommendations From The IACP 2001 Summit (2001).

[12]This opinion was later withdrawn and the case remanded back to the federal district court after the tribal police department apparently obtained federal law enforcement commissions through a cross-deputation agreement with the Bureau of Indian Affairs; Cabazon Band v. Smith, 271 F.3d 910 (9th Cir. 2001).

United States v. Prentiss, 273 F.3d 1277 (10th Cir. 2001) (requiring the U.S. to prove a negative in cases arising under the General Crimes Act: non-Indian status of a defendant or victim).

Given that jurisdiction over most felonies in Indian country lies in federal court, the United States Attorneys are in a position of standing in the front line of prosecuting serious violent crime in Indian country. In recent years, Congress has provided both the Federal Bureau of Investigation and the United States Attorneys Offices with a number of new positions for the investigation and prosecution of violent crime in Indian country - this has been greatly appreciated. Since September 11th, America has been more conscious of public safety in our great nation and Indian country is no exception. There is Indian country on the border with Canada, there is Indian country on the border with Mexico, there is critical infrastructure in Indian country including dams, mines, power plants, schools, and government facilities. In an attempt to address mutual issues of security, the U.S. Border Patrol hosted a Native American Border Security Conference at which Attorney General John Ashcroft recognized that "local law enforcement agencies play a crucial role in securing our nation's borders, and tribal law enforcement agencies are no exception."[13] Federal and tribal law enforcement agencies, working together, will continue to play a pivotal role in making our borders safe and secure. Tribal governments have enthusiastically agreed to help ensure the safety of America's borders to the full extent that they are able to under the current jurisdictional scheme. While focusing on homeland security for America, we should not forget that human beings living in Indian country need protection from violent crime.

[13]Attorney General John Ashcroft, Remarks at the U.S. Border Patrol - Native American Border Security Conference (Jan. 17, 2002). Transcript available at: www.usdoj.gov/ag/speeches/2002/011702agpreparedremarks.htm .

The United States Attorneys need the jurisdictional clarity necessary to properly do our job to provide security for all Americans including those who live, work, travel through, and recreate in Indian country. Thank you for the opportunity to address the committee. I look forward to answering any questions that you may have.